YAP CHUI KUI & ANOR

v.

DATO' LOW NAM HUI & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
LIM YEE LAN JCA
[CIVIL APPEAL NO: J-02-1663-2011]
15 JANUARY 2014

CIVIL PROCEDURE: *Appeal - Appeal against judgment of High Court - Findings of facts - Whether inference of facts made by trial court on evidence inseparably linked to assessment of credibility of witnesses - Whether trial court had audio-visual advantage - Whether appellate court interfered with trial court's findings of fact*

LIMITATION: *Fraud - Discovery of fraud - Fraudulent transfer of shares - Whether appellant's cause of action time barred - Whether s. 29 Limitation Act 1953 applicable*

The appellants and respondents were shareholders of Plenitude Holdings Sdn Bhd ('Plenitude'). The first appellant was also a director in Plenitude and the first and second respondents were chairman and secretary respectively of Plenitude and also directors and shareholders of the third respondent ('Nam Hui & Son'). It transpired that Nam Hui & Son represented to another company ('Faber Union') that it was the registered and beneficial owner of all the issued and paid-up capital of Plenitude and entered into an agreement with Faber Union to hold 60% of the issued and paid up capital of Plenitude for RM54 million. Subsequently, Nam Hui & Son entered into another agreement with Cipriani Sdn Bhd ('Cipriani') to sell all the issued and paid-up capital of Plenitude to Cipriani for RM44,799,997. The respondents, with full knowledge of the dealings by Nam Hui & Son, received substantial financial gains on the transaction of their shares in Cipriani. The appellants filed an action in the High Court and pleaded that these arrangements were made without the appellants' knowledge, authorisation, approval and consent. The respondents, however, argued that at all material times, the appellants knew of all the circumstances of the transactions leading to the exchange of their Plenitude shares for the Cipriani shares which they sold and received full payment but the appellants never made any complaints whatsoever over the past six years. Therefore, the respondents submitted that the appellants' case was barred by s. 6(1) of the Limitation Act 1953 ('the Act'). On the contrary, the appellants argued that their cause of action was based on

fraud and was protected by s. 29 of the said Act. The High Court dismissed the appellants' claim on the ground that the cause of action was time barred. Hence, this appeal.

Held (dismissing appeal; affirming decision of the High Court)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) Limitation was a non-issue. If the appellants' version of facts and inferences to be drawn were accepted, there was a finding of fraud and their claim would not be time barred. On the other hand, if the appellants failed to persuade the court upon their version there was no finding of fraud, then the action was *prima facie* time barred. The High Court took the view that the appellants' version were not credible as well as not probable and found it difficult to accept the appellants' version. (paras 8 & 9)

(2) The High Court made an assessment of the credibility of the witnesses material to the two versions and also the inferences of facts drawn from that assessment in the process of a comprehensive judicial appreciation of the facts. As the grounds of decision of the High Court demonstrated, the inferences in this case was inseparable from the assessment of credibility where the High Court had an audio and visual advantage. Hence, an appellate court should be slow to interfere with findings of facts unless the findings made by the trial court were perverse or against the weight of evidence. In the absence of a finding of fraud, limitation applied. Without the inferences of fact sought and relied upon by the appellants, their cause of action failed. (paras 13 & 14)

Case(s) referred to:
Capital Insurance Bhd v. Cheong Heng Loong Goldsmiths (KL) Sdn Bhd [2005] 4 CLJ 1 FC ***(refd)***
Chong Sooi Chuen v. Yuen Lai Chun [1988] 1 LNS 28 SC ***(refd)***
Mohamed Ismail Mohamed Shariff v. Zain Azahari Zainal Abidin & Ors [2013] 2 CLJ 717 FC ***(refd)***
Port Swettenham Authority v. The Borneo Co (Malaysia) Sdn Bhd [1975] 1 LNS 125 FC ***(refd)***
Song Lian Chye & Ors v. Tai Kian Cheong [1983] 2 CLJ 128; [1982] CLJ (Rep) 375 FC ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 6(l)(a), 29

For the appellants - Alex Tan Chie Sian; M/s Wong Kian Kheong
For the respondents - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-289-2000]

Reported by Sandra Gabriel

JUDGMENT

Abdul Wahab Patail JCA:

[1] In their re-amended writ of summons originally filed on 25 May 2000, the appellants herein as plaintiffs pleaded *inter alia* that:

> 23. The plaintiffs plead that the defendants herein have wrongly and fraudulently represented to them the matters as set in para. 13 herein before, upon which the plaintiffs placed reliance, thereby causing the plaintiffs to act in the manner as set out in para. 14 herein before ... [particulars] ...
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> 24. The plaintiffs plead that amount paid to them as set out in para. 14 herein reflect a substantial loss to the plaintiffs that they were lawfully and rightfully entitled to by reason of which the plaintiffs have suffered loss and damage ... [particulars] ...

[2] They sought reliefs in general damages to be assessed, special damages for the first and second appellants herein, full disclosure and discovery of the accounts indicating the amounts for which the shares in Plenitude Holdings were actually disposed by the third defendant, an order that the defendants do account to the plaintiffs for all the profits that they have benefited and/or derived in respect of the subsequent disposal of shares in Plenitude Holdings by the third defendant and that the defendants are to pay the plaintiffs all the profits that the plaintiffs would have been entitled if the true value of the shares in Plenitude Holdings have been disclosed by the defendants to the plaintiffs, interests and costs and any other or further relief deemed fit and proper.

[3] Briefly, the case for the appellants is that:

(a) The appellants were shareholders in Plenitude Holdings Sdn Bhd ("Plenitude"). The first appellant was also a director;

(b) The respondents were shareholders of Plenitude, and the first and second respondents were chairman and secretary respectively of Plenitude and also directors and shareholders of the third respondent;

(c) The first and second respondents were authorised by the board of directors of Plenitude to arrange or deal with any party with a view to better promote the development of Plenitude, even restructuring of the company;

(d) The first respondent agreed to pay for the recognition of his efforts in procuring the assets in Plenitude;

(e) But subsequently it was discovered that:

A (i) The third respondent represented to Faber Union it was the registered and beneficial owner of all the issued and paid-up capital of Plenitude and on 30 July 1992 entered into an agreement for Faber Union to hold 60% of the issued and paid up capital of Plenitude for RM54 million with RM5 million to
B be paid to the first respondent and balance upon completion;

(ii) On 30 July 1992, the first respondent signed a deed of guarantee and indemnity with Faber Union to indemnify the latter;

C (iii) On 24 December 1992, the first respondent obtained the approval of the shareholders of Plenitude for the exchange of five million nominal RM1 shares for RM27 million, without disclosing who was the purchaser;

D (iv) The first appellant tendered his resignation as director of Plenitude at the request of the first and second respondents by their letter 30 December 1992;

(v) On 29 December 1992, the third respondent entered into an agreement with Cipriani Sdn Bhd ("Cipriani") to sell all the
E issued and paid-up capital of Plenitude to Cipriani for RM44,799,997;

(vi) On 30 December 1992, the third respondent entered into an agreement with Faber Union for the latter to subscribe for shares in Cipriani;
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(vii) On 30 December 1992, Faber Union did subscribe for a total of 45,200,000 shares in Cipriani for RM45.2 million;

(viii) On 30 December 1992, another agreement was entered into between Faber Union and Cipriani, where Cipriani would use
G subscription fees of RM10.8 million to pay its debt to the third respondent who agreed to be responsible for stamp duties exceeding RM2 million for transfer of the Rumah Nenas Land to Plenitude;

H (ix) On 23 April 1993, the third respondent entered into an agreement with Cipriani to amend their agreement of 29 December 1992; and

(x) On 23 April 1992, the third respondent, Cipriani and Faber Union agreed to amend their agreement of 30 December 1992.
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(f) The appellants pleaded these arrangements were made without the appellants' knowledge, authorisation, approval and/or consent.

[4] The defence was that the respondents, at all material times, knew fully all the circumstances of the transactions leading to the exchange of their Plenitude shares for the Cipriani shares which they sold and received full payment therefor, and at all material times, they never made any complaint whatsoever over the past six years:

(a) The respondents knew fully their shares in Plenitude were to be exchanged for a greatly enhanced value in the Cipriani shares;

(b) The respondents received substantial financial gains on the transaction of their shares in Cipriani Sdn Bhd;

(c) The respondents denied the alleged particulars asserted by the appellants and the figures thereunder are the misconceived figures;

(d) The respondents were fully aware of the letter of 7 April 1993 which listed the final allotment of the shares;

(e) The claim is barred by s. 6(l)(a) of the Limitation Act 1953.

[5] After a full trial, the High Court dismissed the appellants' claim. Though not germane to this appeal, the respondents' counter claim was also dismissed.

[6] A 91-page written submission, and oral submissions just over an hour, and a 15 minute reply at the end, strongly reargued the appellants' version of their case. The respondents submitted a 33-page written submission, a 3-page further written submission, and made oral submission of just over 45 minutes.

[7] We begin by addressing the issue of limitation. It was submitted for the respondents that the appellants' case is barred by s. 6(1) of the Limitation Act 1953. It was submitted for the appellants that their cause of action was based in fraud and their cause of action is protected by s. 29 of the said Act. Thus, the High Court erred when it held that the appellants' action was time barred.

[8] In our view, limitation is a non-issue. To put it simply, if the appellants' version of facts and of inferences to be drawn were accepted, there is a finding of fraud and their claim would not be time barred. On the other hand, if the appellants failed to persuade the court upon their version, and therefore there is no finding of fraud, then the action commenced only towards the end of May 2000 is *prima facie* time barred. Though the High Court did not sum up the issue in these terms, it is clearly in the mind of the High Court when it said:

A Having stated the above, it is important to bear in mind that the circumstances under which the plaintiffs had obtained the eight agreements are crucial to the plaintiffs' contention that this action is not time barred.

[9] We came to this conclusion because the High Court had properly B proceeded to set out what it deliberated upon. The High Court held that the first appellant's version as to the manner he had knowledge and came into possession of the eight agreements was not credible and could not be believed. The High Court set out its reasons. The High Court considered and found PW2 under cross-examination was unable to give C rational and consistent answers as to when and whom he approached while making inquiries as to the eight agreements. The High Court also found that PW2's version that he did not have the time to telephone the first appellant after allegedly finding the documents in or about March 1997 in a brown envelope tied with a raffia rope and left in front of his D house and could only pass them to PW3 some ten months later because he was extremely busy with his work and was always on the move, did not quite fit in with PW2's story that he went to Rumah Nanas and Plenitude to make inquiries about the documents. The High Court took the view that the appellants' version regarding the circumstances under which the eight agreements were obtained were not credible as well as E not probable, and found it difficult to accept the appellants' version.

[10] The High Court considered the statement by the first appellant in his witness statement that when proceeding to cash their cheques on 26 May 1993, the broker who accompanied them informed them that F they made large profits since Faber paid RM5 million to Plenitude, which was received by the first respondent upon execution of the sale and purchase agreement in respect of the sale of the land in question, thus raising suspicion of undisclosed gains by the first respondent. We cannot fault the reasoning of the High Court that if this were so, it is certainly G not unreasonable to expect the appellants' to have taken proactive steps to inquire about the suspicion, and the conclusion that because:

(a) There is internal inconsistency in their conduct; and

(b) The contemporaneous conduct of silence coming from a person like H the first appellant who is very literate and aware and assertive of his legal rights and at all times legally represented was most strange and unusual,

the High Court rejected the appellants' version that they were aware of the eight agreements only in early 1998. I

[11] The High Court went on to consider the evidence of the second respondent that he had personally photostatted the agreements and gave them to the first appellant, and the evidence of the second respondent was supported by the evidence of DW2.

[12] We observe also that the High Court took into consideration *inter alia* that the first appellant is both highly qualified and literate, fluent in both English and Mandarin, with impressive academic and business credentials, with a basic degree, a post graduate degree and a doctorate, with vast business experience, starting with brick factory business to housing development, and had engaged with big names in the development industry. We cannot find error with the reasoning that with such background, the first appellant would have quickly become suspicious if there was anything improper about the transactions.

[13] The High Court had not only made an assessment of the credibility of the witnesses material to the two versions, but also the inferences of fact drawn from that assessment in the process of a comprehensive judicial appreciation of the facts. As the grounds of decision of the High Court demonstrated, the inferences in this case was inseparable from the assessment of credibility where the High Court had an audio and visual advantage. Hence, it has been said that an appellate court should be slow to interfere with findings of facts unless the findings made by the trial court are perverse or against the weight of evidence: *Port Swettenham Authority v. The Borneo Co (Malaysia) Sdn Bhd* [1975] 1 LNS 125 FC; *Song Lian Chye & Ors v. Tai Kian Cheong* [1983] 2 CLJ 128; [1982] CLJ (Rep) 375 FC; *Chong Sooi Chuen v. Yuen Lai Chun* [1988] 1 LNS 28 SC; *Capital Insurance Bhd v. Cheong Heng Loong Goldsmiths (KL) Sdn Bhd* [2005] 4 CLJ 1 FC; *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 FC; *Mohamed Ismail Mohamed Shariff v. Zain Azahari Zainal Abidin & Ors* [2013] 2 CLJ 717 FC. As we have mentioned earlier above, we cannot fault the reasoning applied.

[14] We agree that in the absence of a finding of fraud, limitation applied. We note further that without the inferences of fact sought and relied upon by the appellants, their cause of action necessarily fails.

[15] We, therefore, dismiss the appeal, affirm the decision of the High Court, order costs, as agreed, in the sum of RM100,000 here and in the High Court, and order that the deposit be refunded to the appellants.